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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

APPLE INC.,
Plaintiff,
v.
WI-LAN, INC.,
Defendant.

AND RELATED
COUNTERCLAIMS

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CASE NO. 3:14-cv-02235-DMS-BLM
(lead case);
CASE NO. 3:14-cv-1507-DMS-BLM
(consolidated)

**PLAINTIFF APPLE INC.'S
OPPOSITION TO DEFENDANT
WI-LAN, INC.'S MOTION TO
COMPEL**

Dept: 13A
Judge: Hon. Dana M. Sabraw
Magistrate Judge: Hon. Barbara L. Major

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I. INTRODUCTION

Wi-LAN's motion to compel relies on mischaracterizations of the record and misstatements of the applicable law. In each instance, Wi-LAN is seeking information that is outside of Apple's possession, custody, or control (in the case of the Qualcomm and Intel repositories) or is irrelevant to the issues to be tried in this case (in the case of the *CCE v. Apple* materials and the communications about a different industry standard than the one at issue here). The Court therefore should deny Wi-LAN's motion in its entirety.

First, the Court should deny Wi-LAN's request that Apple produce certain Qualcomm and Intel documents on Qualcomm- and Intel-controlled websites, because those documents are not in Apple's possession, custody, or control and because Wi-LAN already has subpoenaed the correct parties, Qualcomm and Intel, for those very same documents. Wi-LAN claims these documents are on a "central repository for Apple engineers" (Mot. at 1), but Wi-LAN knows that is not true. These so-called "central repositories" actually are password-restricted Qualcomm and Intel websites. The fact that certain Apple engineers have access to these websites does not put Qualcomm's and Intel's documents in Apple's possession, custody, or control. Indeed, the most Wi-LAN can say is that certain Apple engineers have "access" to these documents, which is not the legal test.

Second, the Court should again deny Wi-LAN's overly broad requests for documents from the unrelated *CCE v. Apple* litigation, which involved different asserted patents. Wi-LAN tries to couch its requests as seeking "statements Apple made with respect to BSR in the *CCE* litigation" to "hold Apple accountable for its prior representations" Mot. at 2, 15, 16, emphasis added. But in truth, nine of Wi-LAN's ten requests seek statements made by individuals who did not or could not speak for Apple, including CCE's experts, Apple's retained experts and Apple's outside counsel. One request seeks testimony from an Apple employee in the *CCE* litigation, but Rule 30(b)(6) testimony is not a judicial admission and, even if it

were, it would bind Apple only in the litigation in which it was made. None of these individuals could have made admissions that bind Apple in this case (and its outside counsel's closing argument is not even evidence in the first place), so Wi-LAN's basis for seeking these unrelated litigation materials is meritless.

Third, the Court should deny Wi-LAN's motion to compel Apple's communications with Qualcomm (and others) about a different industry standard, the Mobile (4G) WiMAX standard, which has nothing to do with the asserted patents. The Mobile WiMAX standard was published in 2005, years after the priority date of the asserted patents. Wi-LAN's asserted patents concern the original IEEE 802.16 standard (now called "Fixed WiMAX"), which was created in the late 1990s and published in 2001. Wi-LAN's motion conflates the two different standards and argues that Apple's communications with Qualcomm about Mobile WiMAX are relevant to Wi-LAN's patents that purportedly relate to Fixed WiMAX. But Apple's communications about 2005-era Mobile WiMAX technology are irrelevant to whether the Fixed WiMAX standard was "mobile" (it was not) or was a commercial failure (it was). To demonstrate the lack of relevance of the Apple-Qualcomm agreement that mentions Mobile WiMAX, Apple is willing to produce it to Wi-LAN, so that portion of its motion to compel is moot.

II. THE COURT SHOULD DENY WI-LAN'S MOTION TO COMPEL

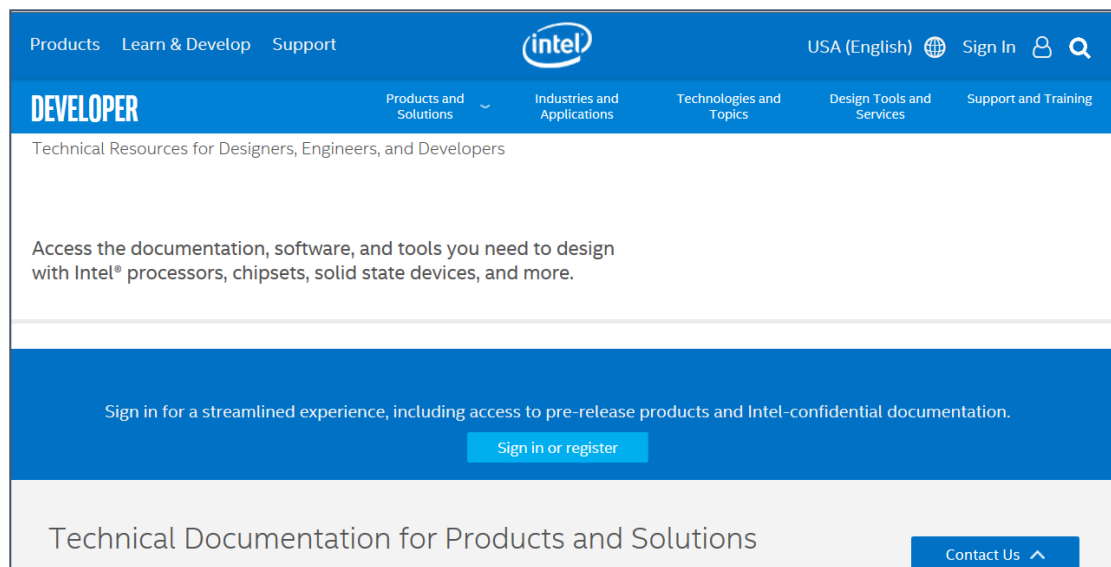
A. Apple Should Not Be Required To Collect And Produce Qualcomm And Intel Documents Located On Restricted Qualcomm- And Intel-Controlled Websites.

Wi-LAN cannot establish that the requested Qualcomm and Intel documents are in Apple's possession, custody, or control. The most Wi-LAN can say is that certain Apple engineers have "access" to the documents on Qualcomm- and Intel-controlled websites.¹ That is not the legal test. Apple has no more possession,

¹ The Qualcomm website at issue is <https://createpoint.qti.qualcomm.com/dashboard/public/productkit#public/product-kit/search>. The "cdmatech.com" link identified during the deposition of Apple's witness now directs the user to www.qualcomm.com/company/about. The Intel website at issue is <https://mobilecommunicationsportal.intel.com>, and directs the

1 custody, or control over these documents than it does for the publicly available
 2 documents on Qualcomm's and Intel's website, or anywhere else on the internet for
 3 that matter. Recognizing this fact, Wi-LAN already has subpoenaed Qualcomm
 4 and Intel for these same documents. But despite this, Wi-LAN proposes that
 5 multiple Apple engineers spend hours searching through these Qualcomm- and
 6 Intel-controlled websites for Qualcomm and Intel documents concerning the
 7 chipsets the two companies sell to Apple, and then to comply with any
 8 confidentiality or notice obligations that Qualcomm or Intel have placed on the
 9 documents. For several reasons, the Court should deny Wi-LAN's requested relief.

10 First, Wi-LAN's claim that the requested Qualcomm and Intel documents are
 11 located on "central" and "readily available" repositories (Mot. at 1) is false. As
 12 evidenced by the screenshot excerpts below, there is nothing "central" or "readily
 13 available" about the Qualcomm and Intel websites that contain these documents:

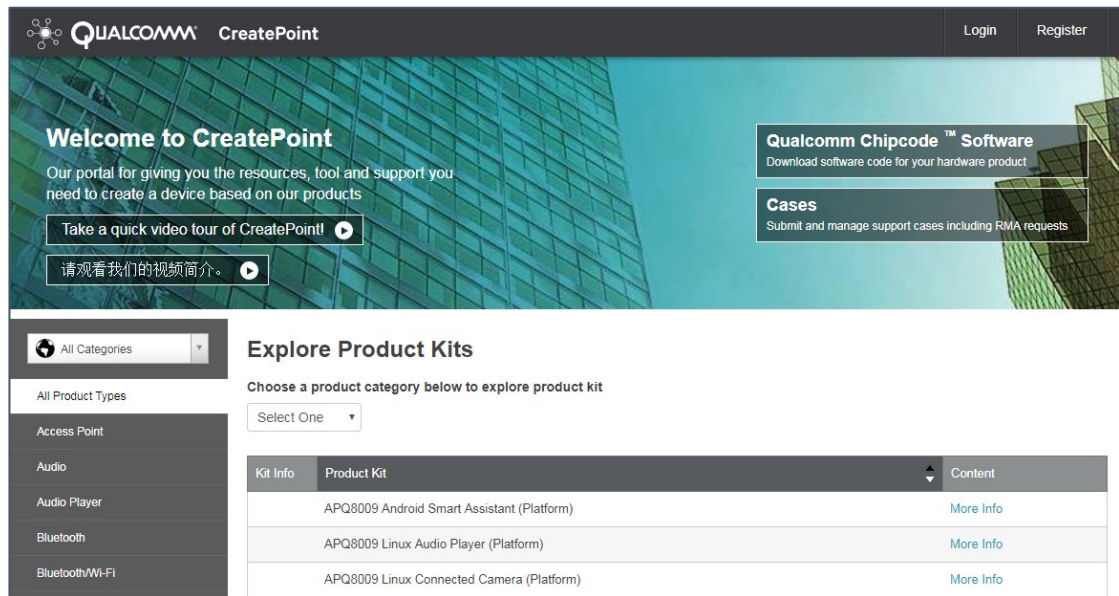


24 Ex. A to Declaration of Jacob Anderson ("Anderson Decl."),
 25 <https://mobilecommunicationsportal.intel.com> (last accessed October 24, 2017).

26 /////

27 /////

28 user to Intel's "Resource & Design Center for Development with Intel."



Ex. B, <https://createpoint.qti.qualcomm.com/dashboard/public/productkit#public/product-kit/search> (last accessed October 24, 2017); *see also* Ex C, Rough Deposition Transcript of Sree Ram Kodali at 86:24-87:11, 120:13-24.² In fact, as Wi-LAN later acknowledges, these are “Qualcomm and Intel repositories.” Mot. at 4. Moreover, Qualcomm and Intel are arms-length commercial suppliers of Apple, not affiliates or subsidiaries. That a handful of Apple engineers have restricted access to certain Qualcomm and Intel documents on these Qualcomm- and Intel-controlled websites is insufficient. *See* Ex. C, Kodali Depo. at 86:24-87:11, 120:13-24.

Second, Wi-LAN conflates “access” to these third-party documents with “possession, custody, or control” of them. But mere “access” is not the legal test. *See Hambrecht Wine Grp., L.P. v. Millennium Imp. LLC*, No. C 05-04625 JW (HRL), 2006 WL 3302428, at *2 (N.D. Cal. Nov. 14, 2006) (“When a court is confronted with separate legal entities, ‘proof of theoretical control is insufficient; a showing of actual control is required.’ The ‘access’ alleged by plaintiff is not the

² Apple’s witness referred to these websites as “shared” because they are used to share documents with external developers. Ex. C, Kodali Depo. at 182:4-6. However, Mr. Kodali explained that the websites are Qualcomm and Intel websites. *Id.* at 179:24-180:4 (“Mobile communication central.com, again in their website”).

1 same as the ‘possession, custody, or control’ required by the Federal Rules of Civil
 2 Procedure.”) (citations omitted). If it were, Wi-LAN could demand that Apple
 3 “access” and produce all of the publicly available Qualcomm and Intel documents
 4 anywhere on Qualcomm’s or Intel’s public-facing websites—obviously an
 5 unreasonable and legally unsupported request. The fact that the requested
 6 Qualcomm and Intel documents are on non-public websites does not place those
 7 documents in Apple’s possession, custody, or control any more than Qualcomm
 8 and Intel documents on Qualcomm and Intel’s public websites. And the fact that a
 9 handful of Apple engineers can access third-party documents on third-party
 10 websites in connection with their work (Ex. C, Kodali Depo. at 86:24-87:11,
 11 120:13-24) does not give Apple the legal right to obtain those documents for this
 12 litigation.

13 Indeed, the “Intel Terms of Use” prevents those Apple engineers from (1)
 14 distributing materials obtained on the website, and (2) “facilitat[ing] the use of this
 15 site or any Materials in connection with any infringement analysis concerning
 16 Intel® products.” Ex. D, [https://www-ssl.intel.com/content/www/us/en/legal/](https://www-ssl.intel.com/content/www/us/en/legal/terms-of-use.html)
 17 [terms-of-use.html](https://www-ssl.intel.com/content/www/us/en/legal/terms-of-use.html) (last accessed October 24, 2017). The “Terms of Use” on the
 18 Qualcomm website similarly prohibits the transmission or distribution of materials
 19 provided on the website. Ex. E, <https://www.qualcomm.com/site/terms-of-use> (last
 20 accessed October 25, 2017). Rather than addressing this point, Wi-LAN offers
 21 nothing more than speculation about what Apple could do with these third-party
 22 documents. *Genentech, Inc. v. Trs. of Univ. of Pennsylvania*, No. C 10-2037 PSG,
 23 2011 WL 5373759, at *3 (N.D. Cal. Nov. 7, 2011) (“Penn similarly has not
 24 demonstrated that Genentech has the broad legal right to demand documents from
 25 Roche More importantly, Penn offers no evidence that Roche is obliged to
 26 hand over materials when requested.”).

27 Third, Wi-LAN already has served subpoenas on Qualcomm and Intel
 28 seeking these same documents, among many other categories. On May 25, 2017,

1 just two days after serving its first set of document requests on Apple, Wi-LAN
 2 served a subpoena on Qualcomm requesting production of 15 categories of
 3 documents, including requests that would trigger production of documents on the
 4 Qualcomm repository. Ex. F, Subpoena to Qualcomm. Wi-LAN suggests
 5 Qualcomm objected to producing its own documents on its own website in response
 6 to Wi-LAN's subpoena (Mot. at 14), but Wi-LAN never raised that objection with
 7 the Court.³ Qualcomm's unresolved objection does not justify an order requiring
 8 Apple to search Qualcomm's website for Qualcomm documents about its own
 9 chipsets. On October 16, Wi-LAN served a subpoena on Intel requesting
 10 production of 20 categories of documents, including the Intel documents hosted on
 11 the Intel repository. Ex. G, Subpoena to Intel. Wi-LAN claims it requested the
 12 documents from Intel "out of an abundance of caution" (Mot. at 14 n.5), but Wi-
 13 LAN ignores that it served 19 other document requests on Intel, many of which also
 14 would cover documents posted on the Intel repository. Ex. G, Subpoena to Intel.
 15 Wi-LAN obviously understands it must "go to the source" for the Qualcomm and
 16 Intel documents it needs to try to support its infringement contentions.

17 Fourth, the decisions that Wi-LAN cites do not apply because they involved
 18 requests for party documents (as opposed to third-party documents) in the physical
 19 possession of a third party. In *TetraVue, Inc. v. St. Paul Fire & Marine Insurance*
 20 *Co.*, the moving party requested the responding party's prior litigation documents
 21 in the physical possession of the responding party's prior litigation counsel. No.
 22 14-cv-2021-W (BLM), 2017 WL 1008788, at *3 (S.D. Cal. Mar. 15, 2017). Here,
 23 Wi-LAN does not contend that the requested documents are Apple documents,
 24 because they are not. In *Carrillo v. Schneider Logistics, Inc.*, the company with

25 _____
 26 ³ Qualcomm's response actually states that "Qualcomm will meet and confer with
 27 Wi-LAN in order to narrow the scope of this request and identify the relevant, non-
 28 privileged information, if any, sought by Wi-LAN that cannot be obtained from
 Apple." Dkt. No. 179-2 at 138 (Ex. 21, Page 180). Wi-LAN offers no account of
 that meet-and-confer, including whether Qualcomm stated that the disputed
 documents could or should be obtained from Apple.

1 physical possession of the requested videotapes stated that the responding party “is
 2 the rightful owner of such videotapes.” No. CV 11-8557, 2012 WL 4791614, at
 3 *12 (C.D. Cal. Oct. 5, 2012). Wi-LAN offers no such statement from Qualcomm
 4 or Intel here. Finally, in *Matthew Enterprise, Inc. v. Chrysler Group LLC*, the
 5 requested documents were part of the responding party’s own “customer
 6 communications database” maintained by an outside vendor. No. 13-cv-04236,
 7 2015 WL 8482256, at *3-4 (N.D. Cal. Dec. 10, 2015). The district court
 8 distinguished these party documents from additional documents in the personal
 9 email accounts of party employees. *Id.* at *4. With respect to the personal email
 10 account documents, the court held the moving party did not identify anything that
 11 “create[d] a legal right for Stevens Creek to take back any such information now
 12 stored in personal accounts.” *Id.* The Court should similarly deny Wi-LAN’s
 13 request that Apple order its employees with access to Qualcomm and Intel websites
 14 to search those websites for Qualcomm and Intel documents about Qualcomm and
 15 Intel chipsets, particularly when there is no evidence that Apple has the legal right
 16 to produce any such third-party documents in this case.⁴

17 **B. The Court Should Deny Wi-LAN’s Renewed Request That Apple**
 18 **Produce Unrelated Litigation Documents From *CCE v. Apple*.**

19 Wi-LAN’s renewed request for materials from the unrelated *CCE v. Apple*
 20 litigation is based on a false premise—namely, Wi-LAN claims it is seeking
 21 statements that “Apple made” in that unrelated case to “hold Apple accountable for
 22 its prior representations” *See* Mot. at 2, 15, 16. The problem with Wi-LAN’s
 23 argument is that nine of its ten requests seek statements that Apple never made, and
 24

25 ⁴ Even if the Court orders Apple to produce responsive Qualcomm and Intel
 26 documents on the Qualcomm and Intel repositories, Apple requests the Court deny
 27 Wi-LAN’s broader request at the conclusion of Wi-LAN’s argument that the Court
 28 order Apple to “provide a complete production of documents responsive to Wi-
 LAN’s RFPs 1-7, 11-16, and 18-20.” Mot. at 14. Wi-LAN’s motion only concerns
 the Qualcomm and Intel repository documents and makes no showing that a
 “complete production of documents responsive” to these 16 requests for production
 is proportional to the discovery needs in this case.

1 the tenth request seeks testimony from an Apple witness that cannot as a matter of
2 law be used a judicial admission in this litigation.

3 Four of Wi-LAN's ten requests seek statements from CCE's experts, not
4 Apple witnesses. Dkt. No. 179-2 at 28-29 (Ex. 8, Pages 70-71), RFP Nos. 54, 55,
5 56, 57 (seeking testimony and expert reports of Michael Caloyannides and Nigel
6 Jones, CCE's technical experts). Obviously, CCE's expert reports and testimony
7 has nothing to do with any representations Apple made, and Wi-LAN has no other
8 justification for seeking these materials.

9 Another four of its requests seek testimony and expert reports from Apple's
10 retained experts in the *CCE* litigation. *See id.*, RFP Nos. 52-53 and 58-59.
11 However, statements by expert witnesses are not party admissions, so Wi-LAN
12 cannot use these materials as "representations" Apple made in that unrelated
13 litigation. *Wilson v. Hartford Ins. Co. of the Midwest*, No. C10-993RAJ, 2011 WL
14 2670199, at *2 (W.D. Wash. July 7, 2011) ("Mr. Wilson is mistaken in his belief
15 that a party's expert's report is equivalent to a party's admission within the meaning
16 of Fed. R. Evid. 801(d)(2). An expert is expected to form her own opinions, not the
17 opinions of the party who hired her."); *Hardin v. Wal-Mart Stores, Inc.*, No. 1:08-
18 cv-00617 AWI GSA, 2010 WL 3341897, at *6 (E.D. Cal. Aug. 25, 2010)
19 ("[O]pinions or reports of experts retained in other cases involving the same
20 defendant are not relevant to *this* action."), *report and recommendation adopted*,
21 No. 1:08-CV-00617 AWI GS, 2010 WL 3745197 (E.D. Cal. Sept. 16, 2010).

22 The ninth disputed request seeks Apple's closing argument from the *CCE*
23 case. *See* Dkt. No. 179-2 at 28-29 (Ex. 8, Pages 70-71), RFP No. 60. Closing
24 arguments are not evidence, nor are they binding party admissions. *Finjan, Inc. v.*
25 *Symantec Corp.*, No. 10-cv-593 (GMS), 2013 WL 5302560, at *25 (D. Del.
26 Sept. 19, 2013) ("[W]ith regard to Finjan's assertion that Sophos made its statement
27 'admitting infringement' to support its invalidity argument, attorney argument is not
28 evidence and the jury properly did not consider the statement as evidence in reaching

1 its verdict.”), *aff’d*, 577 F. App’x 999 (Fed. Cir. 2014). Because Wi-LAN’s stated
 2 interest in these materials is to “hold Apple accountable,” a closing argument in an
 3 unrelated case will not accomplish that goal under any reading of the law.

4 The tenth disputed request seeks Rule 30(b)(6) and trial testimony from an
 5 Apple witness in the *CCE* case. Dkt. No. 179-2 at 28 (Ex. 8, Page 70), RFP No. 51.
 6 However, the law is settled that “Rule 30(b)(6) depositions produce evidence, not
 7 judicial admissions.” *Seabron v. Am. Family Mut. Ins. Co.*, No. 11-cv-01096-
 8 WJM-KMT, 2013 WL 2378576, at *2 (D. Colo. May 30, 2013). Moreover, “even
 9 if Rule 30(b)(6) testimony were akin to an admission, such admission is applicable
 10 only in the case in which it is made.” *Id.*; *see also Rankine v. Roller Bearing Co. of*
 11 *Am., Inc.*, No. 12-CV-2065-IEG BLM, 2013 WL 1942199, at *3 (S.D. Cal. May 9,
 12 2013) (A “judicial admission binds only in the litigation in which it is made.”)
 13 (citations omitted). Thus, Wi-LAN cannot “hold Apple accountable” with non-
 14 binding testimony from an unrelated litigation. The Court should again deny Wi-
 15 LAN’s motion to compel materials from the *CCE* litigation.

16 **C. The Court Should Deny Wi-LAN’s Motion To Compel**
 17 **Communications And Other Documents About A Different,**
 18 **Unrelated Industry Standard.**

19 Finally, the Court should deny Wi-LAN’s effort to obtain communications
 20 and related documents between Qualcomm and Apple about a different industry
 21 standard than the one at issue in this case. Wi-LAN’s motion tries to conflate the
 22 2001-era Fixed WiMAX standard with the different, 2005-era Mobile (4G)
 23 WiMAX standard. Wi-LAN even tries to pretend that its patents are “4G WiMAX
 24 patents” (*see* Mot. at 16), but that is not even arguably true. The asserted patents
 25 claim priority to patent filings in 1999 and 2000, when the Fixed WiMAX standard
 26 was being developed. The 4G Mobile WiMAX standard was not released until
 27 2005, so Wi-LAN’s 1999-era patents cannot possibly relate to that standard. With
 28 this misstatement exposed, Wi-LAN has no basis for seeking communications and
 related documents about a different, much later industry standard.

1 The IEEE has published various WiMAX standards as versions of 802.16.
 2 Ex. H, “IEEE 802.16 WiMAX standards,” available at: [http://www.radio-](http://www.radio-electronics.com/info/wireless/wimax/ieee-802-16-standards.php)
 3 [electronics.com/info/wireless/wimax/ieee-802-16-standards.php](http://www.radio-electronics.com/info/wireless/wimax/ieee-802-16-standards.php). Early versions of
 4 WiMAX developed in the late 1990s, when the asserted patents were purportedly
 5 invented, have come to be known as “Fixed WiMAX,” because they did not
 6 support the use of WiMAX with mobile devices. *Id.* Several years later, IEEE
 7 published 802.16e-2005, which came to be known as “Mobile WiMAX,” because it
 8 supported the use of mobile devices. *Id.* The Mobile WiMAX standard is not
 9 mentioned or described in the asserted patents, and for good reason—the standard
 10 did not exist when the applicants filed for their patents. Thus, any communications
 11 between Apple and Qualcomm (or anyone else) about the Mobile WiMAX standard
 12 has nothing to do with Wi-LAN’s patents or the commercial failure of the Fixed
 13 WiMAX standard. And the capabilities and perceptions of Mobile WiMAX have
 14 nothing to do with the Fixed WiMAX standard either.

15 Once it is clear Wi-LAN is trying to conflate two different standards from
 16 two different technological eras, its relevance arguments collapse. For instance,
 17 Wi-LAN claims “[t]his evidence is critical to rebut Apple’s theme in this case: that
 18 the patents-in-suit are 4G WiMAX patents.” Mot. at 16. But obviously that is not
 19 Apple’s “theme”—if anything, the asserted patents are Fixed WiMAX patents, not
 20 “4G WiMAX patents.” Wi-LAN also claims “Apple should not be allowed to
 21 argue to the jury that the patents-in-suit (via 4G WiMAX) are fundamentally
 22 incompatible with 4G LTE” Mot. at 17. But again, Apple does not contend
 23 the asserted patents are “4G WiMAX” patents, because they are not. Wi-LAN also
 24 claims that “[i]f 4G WiMAX were a fixed standard that could not support mobile
 25 communication, there would be no reason for Qualcomm to pay Apple not to
 26 market 4G WiMAX products” *Id.* Wi-LAN is once again confusing the two
 27 standards—the earlier fixed standard, to which the asserted patents purportedly
 28 relate, and the later mobile standard mentioned in the Marketing Incentive

1 Agreement between Apple and Qualcomm.⁵ Wi-LAN is correct that Apple and
 2 Qualcomm would have no reason to discuss the earlier Fixed WiMAX standard.
 3 Thus, Wi-LAN has no basis for seeking any communications or related documents
 4 about the Mobile (4G) WiMAX standard, and the Court should deny this portion of
 5 Wi-LAN's motion.

6 **III. CONCLUSION**

7 For the foregoing reasons, the Court should deny Wi-LAN's motion to
 8 compel in its entirety.

9 Dated: October 25, 2017

DLA PIPER LLP (US)

11 By /s/ Sean C. Cunningham

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26 _____
 27 ⁵ Although this Agreement is irrelevant for the same reasons as the requested
 28 communications, Apple is willing to produce the Agreement in the interest of
 mooted that portion of the dispute and demonstrating the lack of relevance of the
 Agreement to this litigation.

CERTIFICATE OF SERVICE

I hereby certify that on October 25, 2017, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the CM/ECF registrants.

/s/ Sean C. Cunningham
Sean C. Cunningham